Stoody Company, Division of Thermadyne, Inc. ***and*** **International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO and The Handbook Committee, Party in Interest.** Cases 26–CA–15425, 26–CA–15428, and 26–CA–15521

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On September 23, 1993, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. They also filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

1. The judge found that the Respondent did not violate Section 8(a)(1) of the Act when Production Manager Ray Renken interrogated employee Tony Jaggers about the Union because Jaggers was an open and ardent union supporter and the questions to Jaggers were no more invasive or intimidating than those found lawful in *Rossmore House*.[1] We disagree. Under the totality of the circumstances in this case, we find that Renken's interrogation was coercive and therefore a violation of Section 8(a)(1).

The essential facts are not in dispute. On March 9, 1993, Jaggers was called into Renken's office where Supervisor Dale Hugelmaier was also present. Renken told Jaggers that he would be written up for insubordination if he did not sign his evaluation or give a written statement explaining his refusal to sign. Jaggers refused to sign or give a written explanation. Renken then gave Jaggers a writeup for insubordination and told him that if he did not sign the writeup, he would be further disciplined. Jaggers signed the disciplinary writeup. Immediately after Jaggers signed, Renken asked why Jaggers was for the Union. Jaggers said it was due to the Company's policies. Jaggers and Renken talked further about comparisons between Bowling Green benefits and those at a California union plant. Jaggers then left the office.

In *Rossmore House*, the Board stated that it would weigh the setting and nature of interrogations involving open and active union supporters when applying the test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.[2] The Board found that some factors which may be considered in making such an analysis are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of the interrogation. Considering these factors in this case, we find that Renken's interrogation went beyond the bounds of permissible questioning.

Initially, we note that this interrogation occurred against a background of numerous unfair labor practices committed by the Respondent in an attempt to prevent its employees from selecting the Union as their exclusive collective-bargaining representative. The Respondent, among other things, unlawfully prohibited off-duty employees from distributing union handbills in nonworking areas, threatened employees with discharge if they did not obey the unlawful no-access rule, granted a more favorable method of computing overtime in order to discourage union membership and activity, and promised to remedy employee concerns in order to discourage union organizing.

Further, Renken was a high level supervisor, superior in rank to Jaggers' immediate supervisor, Dale Hugelmaier. The interrogation occurred in Renken's office, ''the core of management authority,''[3] in the context of a confrontation over Jaggers' evaluation.[4] It was immediately after the confrontation ended in a disciplinary writeup that Renkens questioned Jaggers about his support for the Union. There was no apparent proper purpose for Renken's questions. Nor did Renken give assurances to Jaggers that he did not have to answer or that his answer would not affect his job. This is particularly significant in light of the fact that Renken had disciplined Jaggers moments before bringing up the question of the Union.

We believe that in these circumstances, Renken's questioning was not the kind of casual questioning reflecting the realities of the workplace which the Board held lawful in *Rossmore House*. A consideration of all the factors compels the conclusion that the interrogation was coercive. The questioning of an employee about his union sentiments by a high level supervisor in his office immediately after a confrontation which led to discipline, with no proper reason or assurances given concerning the questioning, reasonably tends to restrain, coerce, or interfere with statutory rights. This conclusion is further supported by the fact that the Respondent committed unfair labor practices directed toward discouraging union and concerted activity both before and after Renken's interrogation of Jaggers. Indeed, Renken committed an unfair labor practice the morning after he interrogated Jaggers by attempting to

[1] 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[2] Id. at 1178 fn. 2.

[3] *Midland Transportation Co.*, 304 NLRB 4, 8 (1991).

[4] *Litton Microwave Cooking Products*, 300 NLRB 324 (1990).

prevent Jaggers from telling fellow employees about the discipline he had received from Renken the day before.

Accordingly, we find that under the test established in *Rossmore House*, the interrogation of Jaggers violated Section 8(a)(1) despite the fact that he was an open and ardent union supporter.[5]

2. The judge found that Respondent dominated the formation and administration of the Handbook Committee and contributed financial support to it and thereby violated Section 8(a)(2) and (1) of the Act. We find that the Handbook Committee created by the Respondent did not engage in a pattern or practice of dealing with the Respondent on employment conditions. Accordingly, we find that the Committee was not a labor organization under Section 2(5) of the Act and that the Respondent did not violate Section 8(a)(2) in connection with the Committee.

The judge credited the testimony of Plant Manager Hodges that he announced to employees in a meeting on January 7, 1993,[6] the formation of a handbook committee that ''was not to discuss wages, benefits, or working conditions, but was to gather information about different areas in the handbook that were inconsistent with our current practices, that were obsolete, or that were misunderstood by employees so we could get them cleared up as soon as possible.'' The judge further found that neither Hodges nor any other of the Respondent's agents referred to the discussion of the handbook's contents as negotiations. Although the judge found that the Respondent committed other unfair labor practices in connection with the Union's organizing campaign, he did not find that the Handbook Committee was formed in response to or to avoid unionization.

The first meeting of the Handbook Committee took place on January 14. Hodges was not present at this meeting. Director of Materials Management Hewitt was in charge of the meeting attended by seven nonsupervisory employees and two other supervisors. Employee members of the Committee went beyond the discussion of inconsistencies between the handbook and current practice by raising concerns and making proposals about such matters as notification for vacation time. Hewitt did not attempt to prevent the Committee from discussing such matters. Instead, he participated in the discussion of employment conditions. The Committee recommended that the vacation notification time be changed from 2 weeks to 1 week. The meeting lasted for 1 hour. The next meeting was scheduled for January 21.

On January 15, Hewitt wrote a memo to Hodges describing the subjects that had been discussed and recommending that the wording be developed on the vacation notification issue ''and incorporate the calendar year changes so we can put this to bed.'' Hodges also had a discussion with Hewitt after the Committee meeting. According to Hodges' uncontradicted testimony, Hewitt told Hodges that the meeting had gone well but that he had trouble with one of the members wanting to call it ''negotiations.'' Hodges testified: ''I told him that he had to confront that issue up front and make sure that they understood, again, that it was not to discuss wages, benefits, or working conditions. That it was an information gathering committee.''[7]

Soon after Hodges' discussion with Hewitt, the Respondent received notice that the Union had filed charges that the Respondent's conduct concerning the Committee violated Section 8(a)(2). A brief meeting of the Committee was held on January 21 for the purpose of announcing that the Committee would not hold any more meetings. No further meetings had been held or scheduled at the time of the hearing in this case.

The judge conceded that no pattern or practice of entertaining employee proposals on working conditions had been established. However, he found that because the Respondent had scheduled another meeting of the Committee and had established no cutoff date for the life of the Committee, it was not unreasonable to conclude that the meetings would have continued in the same vein, absent the filing of unfair labor practice charges. In this regard, he found that the absence of any showing that succeeding meetings would not have continued in the same manner was sufficient to support the inference that the meetings would so continue. The judge found: ''However blameless the original intent of Respondent may have been in establishing the Handbook Committee, Respondent acquiesced to and willingly participated to a change of course and purpose when the January 14 meeting became a forum for the presentation of employee concerns which Hewitt undertook to remedy as his memo plainly shows with respect to the prevacation notification requirement and the scheduling of future discussion of 'concerns which people have regarding our policies.''' The judge concluded that in these circumstances the Handbook Committee had employee members and existed, at least in part, for the purpose of dealing with the Respondent concerning conditions of work. Under the rationale of the Supreme Court's decision in *NLRB v. Cabot Carbon Co.*,[8] the judge found that the Handbook Committee was a labor organization within the meaning of Section 2(5) and that the Respondent's actions toward

[5] Chairman Gould finds it unnecessary to address the propriety of the *Rossmore House* approach to interrogation because a violation is established here, even under that approach.

[6] All dates are in 1993 unless otherwise indicated.

[7] Tr. 228, LL. 9–13.

[8] 360 U.S. 202 (1959).

it were, therefore, subject to the prescriptions of Section 8(a)(2). We disagree.

The critical question in this case is whether the Handbook Committee existed, at least in part, for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work as set forth in Section 2(5) of the Act. Contrary to the judge, we find that the Committee did not exist, even in part, for such a purpose. In *E. I. du Pont & Co.*,[9] the Board described ''dealing with'' as a bilateral mechanism between two parties. The Board said:

> That ''bilateral mechanism'' ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.[10]

Drawing the line between a lawful employee participation program and a statutory labor organization may not be a simple matter because it may be difficult to separate such issues as operations and efficiency from those concerning the subjects listed in the statutory definition of labor organization.[11] If parties are burdened with the prospect that any deviation, however temporary, isolated, or unintended, from the discussion of a certain subject, will change a lawful employee participation committee into an unlawfully dominated labor organization, they may reasonably be reluctant to engage in employee participation programs.

We support an interpretation of the Act which would not discourage such programs.[12] The portion of the majority opinion in *du Pont* discussed above provides such an interpretation. By requiring that ''dealing'' consist of a pattern or practice of making proposals to management on the subjects covered in Section 2(5), *du Pont* allows for the isolated errors that may occur in any genuine attempt to change the interaction between employer and employees. Such errors or missteps will not result in a finding that an employee participation committee is a statutory labor organization. At the same time, *du Pont* makes it clear that recurring instances of an employee participation committee making proposals to management on mandatory subjects constitutes ''dealing'' and the committee will be found to be a labor organization. This, we believe, strikes a proper balance which permits experimentation with employee participation but protects against the danger of an employer dominated labor organization which Section 8(a)(2) was designed to address.

Applying this analysis to the facts here, we find that there was no dealing. As the judge conceded, no pattern or practice of dealing was established by the General Counsel. The Committee had the brief lifespan of 1 hour only. Clearly, a 1-hour meeting in itself shows no pattern or practice of any kind. Further, we believe, contrary to the judge, that the evidence supports the inference that if additional meetings of the Committee had been held, the meetings would not have resulted in proposals to management on working conditions.

In announcing the formation of the Committee to employees, Hodges carefully limited the purpose of the Committee to information gathering. He stated that the Committee was not to discuss wages, benefits, or working conditions, but was to gather information about inconsistencies between the employee handbook

[9] 311 NLRB 893, 894 (1993).

[10] Id. Chairman Gould agrees in substantial part with this analysis of the term ''dealing with'' under Sec. 2(5). It is a reasonable construction of the Act which allows employers and employees to explore cooperative efforts without the fear that one error or isolated incident will transform a genuine attempt to cooperate into the unlawful domination of a labor organization.

[11] Chairman Gould notes that Sec. 2(5) refers to dealing with the employer on ''grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'' In this connection, he believes that the *du Pont* decision was in error to the extent that it treated the subjects listed in Sec. 2(5) as interchangeable with mandatory subjects of bargaining. The determination of whether a subject of bargaining is mandatory or nonmandatory is made with respect to the obligation to bargain under Sec. 8(a)(5). The law tends to be restrictive in this area. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), where the Supreme Court held that a management decision to engage in a partial closing was not a mandatory subject of bargaining. See W. Gould, *The Supreme Court's Labor and Employment Docket in the October 1980 Term: Justice Brennan's Term*, 53 *U. Colo. L. Rev.* 1, 6–18 (1981). In contrast, the law tends to be more expansive with respect to the subjects listed under Sec. 2(5). See, e.g., *Cabot Carbon Co.*, 360 U.S. 203, 213–214 (1959), where the Supreme Court in finding that the employee committee at issue was a statutory labor organization referred not only to its dealing with the employer on grievances, but to its dealing with the employer ''with respect to matters covering nearly the whole scope of the employment relationship.''

As he has stated elsewhere, Chairman Gould thinks the better policy is to compel bargaining on all subjects bearing some nexus to the employment relationship and not to make the artificial distinction between mandatory and nonmandatory subjects. See William B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law*, (MIT Press, 1993), pp. 170–173. Under his view, both subjects of bargaining and subjects defining a statutory labor organization should be construed expansively. That, however, is not the current state of the law and for this reason, he believes it is not correct to interchange mandatory subjects of bargaining under Sec. 8(a)(5) with the subjects listed under Sec. 2(5) as *du Pont* appears to have done.

[12] Chairman Gould has long believed such an interpretation can lead to the achievement of true democracy in the work place. See Chairman Gould's concurrence in *Keeler Brass Co.*, 317 NLRB 1110 (1995), and works cited therein.

and actual practices. During the 1-hour meeting, it was not Hewitt who led the members beyond the process of gleaning information about current practices. Employee members of the Committee initiated the discussion of working conditions and the making of proposals. True, Hewitt did not assert control over the discussion and participated in the discussion of proposals concerning working conditions. But this alone is hardly evidence that the Respondent was prepared to abandon its original idea and allow the Committee to deal with it on working conditions in future meetings. Indeed, the uncontradicted testimony of Hodges indicates that prior to receiving notice of the unfair labor practice charge, he expressed alarm to Hewitt that the Committee had strayed from information gathering and instructed Hewitt to make sure that the Committee understood that it was not a negotiating body, that it was to glean information about inconsistencies but not to make proposals concerning the change of practices or policies.

In light of Hodges' comments before and after the meeting of the Committee, we find that the evidence supports the inference that the Committee would not have been permitted to continue to deal with working conditions, and that the 1-hour meeting would not have grown into a pattern or practice of dealing with the Employer within the meaning of Section 2(5). What happened here appears to us to be the kind of situation that is likely to occur when an employer is attempting something new and its supervisors have little or no experience with participation efforts. Absent evidence of a pattern or practice, or of a design to interfere with the organizing efforts of an independent labor organization,[13] we do not think such conduct violates the Act. Accordingly, we find that the Handbook Committee was not a labor organization and that the Respondent's actions in connection with it, therefore, did not violate Section 8(a)(2).[14] We dismiss these allegations of the complaint.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Stoody Company, Division of Thermadyne, Inc., Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(f).

''(f) Interrogating employees about their union activities or sympathies or threatening to interfere with protected concerted activity.''

2. Delete paragraph 1(a) and reletter the subsequent paragraphs.

3. Delete paragraph 2(a) and reletter the subsequent paragraphs.

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain or enforce any rule prohibiting off-duty employees from distributing union literature in nonworking areas when there is no justifiable business reason to do so.

WE WILL NOT grant benefits to our employees in order to discourage union membership or activities.

WE WILL NOT promise to remedy employee concerns during the course of a union organizing campaign.

WE WILL NOT threaten to discharge or otherwise retaliate against employees because they do not obey unlawful company rules.

WE WILL NOT interrogate employees about their union activities or sympathies or threaten to interfere with protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

STOODY COMPANY, DIVISION OF THERMADYNE, INC.

Jane Vandeventer, Esq., for the General Counsel.

[13] If an employer formed an employee participation committee in response to a union organizing campaign, Chairman Gould would draw the inference that the organization was designed to thwart employee independence and free choice.

[14] Member Cohen agrees that there was no ''dealing'' in this case. Accordingly, in his view, it is unnecessary to reach any issues concerning the scope of the subject matters listed in Sec. 2(5). However, he notes his general agreement with Chairman Gould that Sec. 2(5) is ''more expansive'' in this respect than the more ''restrictive'' definition of mandatory subjects.

Member Cohen also wishes to emphasize that the 8(a)(2) allegation is dismissed herein because of the absence of ''labor organization'' status. Thus, it is unnecessary to reach any issues of ''unlawful domination.''

Jerry Kronenberg, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me in Nashville, Tennessee, on June 23 and 24, 1993, pursuant to charges timely filed and served and consolidated complaint issued April 15, 1993, and amended at trial. General Counsel alleges that Respondent violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act) in early 1993.[1] Respondent denies it has violated the Act.

On the entire record, and after considering the testimonial demeanor of the witnesses and the posttrial briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find Respondent is a corporation which has been engaged in manufacturing and selling welding products and related materials at its facility in Bowling Green, Kentucky, at all times material to this proceeding and, during the 12-month period ending December 31, 1992, sold and shipped goods valued in excess of $50,000 directly from that facility to points outside the State of Kentucky and purchased and received at the facility more than $50,000 worth of goods arriving directly from points outside the State of Kentucky. At all times material to this proceeding, Respondent has been and now is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORS AND AGENTS

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Dave Hodges	Plant Manager
Renae Spencer	Director of Human Resources
Dale Hugelmaier	Supervisor
Ray Renken	Production Manager
Ed Whaley	Coiling Supervisor
Ron Parker	Coating Supervisor
Gary Hewitt	Supervisor

IV. PREVIOUS LITIGATION

On June 21, 1993, Judge Michael O. Miller issued his Decision in Stoody Company Division of Thermadyne, Inc., Case 26–CA–15025, recommending to the Board that Respondent be found in violation of the Act in certain respects. I have taken official notice of certain motions before Judge Miller and his rulings thereon which are relevant to Respondent's affirmative defense in this proceeding urging the dismissal of many allegations in the consolidated complaint before me on the ground they were known or should have been known by the General Counsel prior to or during the hearing before Judge Miller, and their litigation before me is therefore barred by *Jefferson Chemical Co.*, 200 NLRB 992 (1972), and its progeny.

V. THE JEFFERSON CHEMICAL DEFENSE

The facts that must be considered in assessing the validity of this defense are quite clear as are the applicable principles of law. Turning first to the facts, the complaint in Judge Miller's case alleging violations of Section 8(a)(3) and (1) of the Act occurred in February and April 1992, issued May 22, 1992, and was litigated before Judge Miller on January 14 and 15, 1993. The charging union in that case was the IBEW.[2] The first charge in the matter before me was filed January 14, 1993. Subsequent charges and amended charges were filed in January, February, and March. As previously noted, the consolidated complaint issued April 15. It alleges violations of the Act in January 1993.

On February 24, 1993, counsel for the General Counsel filed a motion to Judge Miller to consolidate cases and reopen hearing. In support of this motion, counsel for the General Counsel argued that matters alleged in Cases 26–CA–15425 and 26–CA–15428 (which are now before me) should be consolidated for hearing with Case 26–CA–15025 (which Judge Miller had heard) because the allegations in the later cases were directly related to allegations before Judge Miller.[3] Counsel for the Respondent opposed the motion and argued that the cases should not be consolidated because there was no substantive or temporal relationship between them. On March 9, 1993, Judge Miller denied the motion to consolidate and reopen the record because he found insufficient nexus between the cases to warrant consolidation.

General Counsel contends the opportunity to litigate the allegations cannot be denied and Judge Miller's denial of the motion to consolidate left General Counsel free to litigate the cases before me. I agree. The absence of a common charging party[4] and the time lapse[5] between matters litigated before Judge Miller and those litigated before me are sufficient to warrant separate trials, as Judge Miller's ruling clearly implies. Moreover, the Board has recently held that if an amendment of the complaint to allege closely related matters is disallowed, the General Counsel is free to litigate those rejected allegations in a later proceeding. *Highland Yarn Mills*, 310 NLRB 644, 645 (1993). An effort to consolidate cases in order to litigate all closely related matters in one proceeding is functionally equivalent to a motion to amend. In both cases the aim of the motion is to combine all related matters in one proceeding. When counsel for the General Counsel

[1] All dates are 1993 unless otherwise specifically indicated.

[2] International Brotherhood of Electrical Workers Local Union 369, AFL–CIO.

[3] Counsel for the General Counsel had noted on the record before Judge Miller on January 14 that if there proved to be merit in the new charges filed that day, but which had not yet been investigated, General Counsel would consider moving to consolidate the new charges with those then before Judge Miller if required to so do by *Jefferson Chemical*, supra.

[4] See, e.g., *Venture Packaging*, 290 NLRB 1237 fn. 1 (1988).

[5] Compare *Best Lock Corp.*, 205 NLRB 648 (1991), and *Martemont Corp.*, 249 NLRB 216, 217 (1980).

moved to consolidate, she fulfilled her duty on behalf of General Counsel to make efforts to litigate all related matters in one proceeding. When Judge Miller denied her motion she was free under the *Highland Yarn Mills* rule to litigate before me the allegations she was not permitted to consolidate. For the foregoing reasons, Respondent's contention that the failure to litigate the items before Judge Miller that it now seeks to strike is sufficient reason to bar General Counsel from now litigating them is rejected.

VI. THE ALLEGED UNFAIR LABOR PRACTICES

The allegations may be most conveniently dealt with as falling within three general classifications, i.e., (1) the institution of a new policy for calculating overtime; (2) rules and statements concerning solicitation and distribution; and (3) the formation and utilization of a handbook committee.

A. *The Overtime Policy*

David Hodges came to Respondent's Bowling Green, Kentucky facility as its vice president and general operations manager on November 2, 1992, almost 7 months after the employee conduct found by Judge Miller to constitute unfair labor practices. Prior to that time he had been a division controller in Respondent's corporate offices in St. Louis, Missouri.

When Hodges arrived at Bowling Green, he found that employees were being paid overtime for work performed over 40 hours a week and that the basic 40 hours could include vacation days, holidays, and sick days on which the affected employee did no work. After consultation with the Corporation's director of human resources, who advised overtime was to be paid only for hours actually worked per week in excess of 40 hours a week, Hodges on December 4, 1992, convened a meeting with all the employees, announced a change in the method of computing overtime, and gave the employees copies of an interoffice memorandum signed by him and reading, in relevant part, as follows:

> In the past twelve months overtime has been paid many different ways and the policy interpreted many different ways. This is how I, and the corporate office, interpret the policy and how overtime pay will be handled:
>
> Overtime pay is for all hours worked in excess of 40 hours per week. The pay for overtime will be 11/2 times straight time. Hours worked are defined as time physically worked at your job for the Company.
>
> *This does not include hours paid for sick time, vacation time or holiday time.*
>
> If a non-exempt employee is asked to work on a holiday, that employee will be paid his normal straight time for hours worked plus his holiday pay.
>
> At no time was there the intent to duplicate pay or to pay employees time and a half for holiday pay.
>
> Again, I would like to re-emphasize that overtime pay, by Federal and State law and by our policy, is for hours physically worked in excess of forty hours per week. We will pay time and a half for all non-exempt employees working overtime.

This change in the method of computing overtime is neither alleged nor found to be an unfair labor practice.

Several employees met with Larry Reid, regional organizer for the Union, on December 21, 1992, and discussed union organizing. The following day about eight of the employees began to wear union organizing buttons to work. On the morning of January 4, 1993, before the work shift commenced, four or five employees stood beside the company timeclocks and distributed union handbills to employees as supervisors passed by.

Two days later, on January 6, Hodges directed a memorandum to employees concerning overtime pay which advises:

> After our last meeting on factory overtime pay on December 1st, I had a lot of employees approach me with complaints about the overtime policy stating that the policy was not consistent with standard practice of other factories in the area.
>
> I gave this a great deal of consideration and made a proposal to our corporate office to change our policy manual at Stoody. This has been approved.
>
> The proposed revision is that all hours worked in excess of normal scheduled work hours will be paid overtime. Thus is an employee is normally scheduled to work eight hours per day and works nine hours in that day, the employee will be paid eight hours straight time and one hour at time and one-half overtime rate. If an employee is normally scheduled to work Monday through Friday and that employee is asked to work on Saturday and does so, the employee will be paid time and one-half overtime rate for all hours worked on Saturday.
>
> Under our present schedule, any hours worked in excess of eight hours per day or any hours worked on Saturday or Sunday would be paid at overtime rate.
>
> I believe this policy change will give most employees what they are requesting and be in the best interest of all employees.
>
> I have not said anything about this prior to today because I do not want to get in the habit of promising things or telling you things will happen before I have the necessary approvals to ensure that they will happen.
>
> I am proposing this change to each of you and would like to have a meeting at 3:15 on January 7 to discuss the change and any objections there may be.

As promised in the memo, Hodges subsequently did meet with the employees on January 7 and personally confirm the changes in overtime pay set forth in the memo. This new overtime pay policy providing for time-and-a-half for hours worked in excess of 8 on any day and further providing time-and-a-half for *any* hours worked on Saturday or Sunday presented the employees with a potential increase in earnings without increase in actual hours worked. Thus, a person working 4 10-hour days would, under the January 6 plan, receive 44 hours pay whereas there would be no overtime pay under the December 4 plan until the employee worked more than 40 hours a week.

The complaint alleges Respondent, about January 8, 1993, reinstituted a policy for calculating overtime which included holidays, sick days, and vacation days as time worked in order to discourage support for the Union. Respondent clearly did not reinstitute a policy which included holidays, sick days, and vacation days as time worked but, rather, instituted a brand new policy on computation of overtime. Nevertheless, the matter was fully litigated and no party contends the allegation is not broad enough to cover the action Respondent took. Accordingly, I deem it appropriate to decide whether the institution of the new policy violated the Act.

The implementation of the new policy 15 days after employees starting wearing union buttons to work, 2 days after the employees publicly displayed union support by handbilling at the facility, and but 1 month after the earlier policy revision which Hodges avers was the result of consultation with and approval by corporate headquarters, is not only suspicious but may suggest antiunion animus as a motivating factor in the January 6 policy change. *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1353 (7th Cir. 1984); *Equitable Resources Energy Co.*, 307 NLRB 730 (1992). Moreover, Respondent's statement in its employee handbook, which was in effect on January 6, 1993, contains the following ''Policy Statement'':

> Stoody Company is a union free Company. It is our sincere belief that a union would not benefit the employees at Stoody Company, and it is our intention to prevent any union from interfering with the present open relationship that exists between our employees and management by every proper and legal means available.
>
> We prefer to deal with people directly rather than through a third party. This is a non-union organization and it is certainly our desire that it always be that way. This does not mean that from time to time we do not have problems. However, we have always been able to work these out among ourselves without the intervention of outsiders. No organization is free from day to day problems but we have the desire and believe that we have policies and practices to help resolve problems rather than fight with each other. Unions have never gotten any employee their job, neither have they caused anyone to keep his job. Only all of us working together to make this a viable, healthy organization are able to do that. We encourage you to bring your problems to your supervisor or anyone else you feel can help you and we in turn promise to listen and give the best possible response that we can. In today's world there are many pressures. We want to keep our organization free from artificially created tensions that can be brought on by the intervention of outsiders such as a union. We feel that a union would be of no advantage to any of us. It would hurt the business on which we all depend for our livelihood. We accept our responsibility to provide the best working conditions, pay and benefits that we can afford. It is not necessary for you to pay union dues to receive fair treatment in this company. Each of you is an individual and you have the right to speak for yourself.
>
> At some point in your career at Stoody Company, you may be approached by a paid organizer or a fellow employee who will try to persuade you to sign a card requesting union representation. Their job is to make unions sound good and try to convince you that a union can do something beneficial for you.
>
> Before you sign anything—before you give away your privilege to speak and act on your own behalf—we urge you to consider the problems associated with having a union as your exclusive representative, as well as the total job package Stoody Company is currently providing to you and your family. This total job package has been earned by you and provided by the Company without the need for a union, without payment of union dues, without strikes and without the loss of individual freedom. Invest in your future security, and that of your family, by protecting your individual freedom and supporting the policy of positive and open management without third party union interference.

Although it is not alleged and I do not find this statement of policy violates the Act, it clearly shows Respondent's strong aversion to unionization and may be used to show antiunion animus.[6] The combination of overt union activity known to Respondent, the timing of the January 6 policy change, and Respondent's openly announced opposition to unionization is sufficient to warrant an inference, which I draw, that antiunion animus was a motivating factor in the decision to make the change in overtime computation announced to employees on January 6, 1993.

Respondent's defense to this allegation is based on the testimony of David Hodges, whose testimony relates the following sequence of events: When he announced the December 4 policy, employees complained it was not the general practice in the area and was not consistent with Respondent's handbook, to which he replied that he would have a survey conducted on overtime in the geographical area, would discuss the matter with corporate officers, and would see what could be done. He then instructed Renae Spencer, director of human resources at the facility, to survey area companies of a size comparable to that of Respondent to ascertain their practice concerning overtime payments. Spencer reported to him about December 14 that 27 percent of similarly sized area companies paid overtime for hours worked over 8 per day and for Saturday work if their normal scheduled workweek was Monday through Friday, and that Holley, a much larger company from which 20 or 25 percent of Respondent's employees had come, handled overtime pay the same way. This information moved Hodges to decide to change the policy as he did in January, but he first had to get approval from the corporation's president, executive vice president, and executive vice president of human resources. He was unable to contact them because they were otherwise engaged until Christmas day when he talked to the executive vice president who agreed to set up a meeting with all three corporate officers, all of whom did then have a conference call with Hodges on January 6, 1993, and approved the plan which he wrote and distributed that day. Hodges' version of events leading to the January change in overtime computation is plausible but, with the exception of acknowledgment by General Counsel's witnesses that Hodges told then when he announced the change in January that the change was based on a survey of other employers in the area, is supported by nothing more than his say so. Renae Spencer, testi-

[6] *Fairfax Hospital*, 310 NLRB 299, 314 fn. 18 (1993); *Gencorp*, 294 NLRB 717 fn. 1 (1989); *Chicago Rivet & Machine Co.*, 275 NLRB 1298, 1301 fn. 7 (1985); *General Battery Corp.*, 241 NLRB 1166, 1169 (1979).

fying on other matters, gave no testimony concerning the conduct ascribed to her by Hodges in connection with the purported survey of area companies. No documentation of said survey, or indeed any document relevant to the issue other than Hodges' January 6 memo to employees, was proffered in evidence. None of the corporate officials who purportedly discussed and approved Hodges' plan were called to testify. There is no showing they were unavailable to Respondent. Spencer was obviously available. Considering the obvious fact that testimony from these persons which corroborated Hodges' testimony would bolster his credibility and go a long way toward exonerating Respondent with respect to the allegation here leveled against it, the failure of Respondent to call any of these potential witnesses to testify in support of Hodges with regard to the matters relating to the establishment of the January 1993 policy concerning overtime gives rise to an inference these persons, if called, would not have supported Hodges' description of significant events.[7] Accordingly, I do not credit Hodges' recitation of the planning, authorization, and timing of the new policy. Respondent has not rebutted General Counsel's prima facie case. I therefore conclude and find General Counsel has shown by a preponderance of the credible evidence that Respondent violated Section 8(a)(3) and(1) of the Act by granting the employees a more favorable method of computing overtime pay on January 6, 1993, in order to discourage union membership and activity.

B. *The Handbook Committee*

During the January 7 meeting in which he announced the new overtime computation policy discussed above, Hodges also announced the formation of a handbook committee. After studying the testimony of other management and rank-and-file employees concerning what Hodges said when he made that announcement, I am persuaded and find that his testimony which follows is a credible and reasonably accurate recollection of his explanation to the employees and supervisors assembled on January 7.

> I announced that I wanted a Handbook Committee. This Handbook Committee would be consisted of volunteers of both exempt and non-exempt employees throughout the facility. That this committee was not to discuss wages, benefits, or working conditions, but was to gather information about different areas in the handbook that were inconsistent with our current practices, that were obsolete, or that were misunderstood by employees, so we could get them cleared up as soon as possible.

I further find that at no time did Hodges or other of Respondent's agents refer to the discussion of the handbook's contents as negotiations or otherwise state those contents were being negotiated. To the extent certain of the employees referred to handbook negotiations or negotiating meetings, I conclude these references were their own constructions rather than reflective of any of Respondent's statements concerning the handbook review.

Hodges appointed Gary Hewitt, Respondent's director of materials management, to conduct the handbook review and to supervise the selection of employees to serve on the committee. This selection was accomplished by employee election of representatives in each department. These elections and Respondent's selections of management representatives resulted in a committee composed of seven nonsupervisory employees and three supervisors: Hewitt, Pat Paro, and Dale Hugelmaier, with Hewitt clearly in charge of the project. The selection of a committee thus accomplished, its first meeting took place on January 14. Employee members of the committee were paid for the time. Hewitt and employees Randy Hawks and Marilyn Hastings testified concerning the content of that meeting. Although Hawks and Hastings make reference to ''negotiations'' with the Company during the meeting, both concede Respondent's representatives never in their presence so characterized what went on at that meeting. I have examined the testimony of Hawks, Hastings, and Hewitt, Hewitt's notes made at the meeting, Hewitt's January 15 memo to Hodges describing what transpired during the meeting, compared their testimonial demeanor, and concluded the hour-long meeting proceeded in the folllowing fashion. Employee members of the committee, notably Hawks, did not confine themselves to issues of inconsistency between handbook requirements and actual practices in accord with the purposes for which Respondent asserts it established the committee, but raised concerns and suggested changes in both policies and practices. The reason for this venture into matters outside the parameters announced by Respondent was, I believe, the understanding expressed by Hawks, ''I thought we were there to negotiate the policy handbook.'' Consistent with his understanding so stated, Hawks raised questions on several issues which went beyond cleaning up the handbook to confirm with the policies, as did other employees. Hewitt's January 15 memo to Hodges concerning what went on at the meeting the prior day relates, in relevant part:

> The purpose of the committee is to define current policies and bring to the attention of management any discrepancies or errors in our handbook.
>
> We had our first meeting yesterday with most of the members present. We made a list of concerns which people have regarding our policies. They are structured under the following generic headings:
>
> 1. Seniority issues (Departmental, Job Classification, Plant) with job posting, bidding, trial periods, recall procedures.
> 2. Sick days, make-up time, personal time.
> 3. Formalized complaint procedures.
> 4. Explanation of ''employment at will'' paragraph on page 2.
> 5. Reduce the two week vacation time notification.
> 6. Clearly define overtime policy and provide examples.
> 7. Better define length of time for maternity leave.
> 8. Briefly discussed evaluations and the Corporate policy on reviews requiring the supervisors signature as well as the next level manager's.
>
> We decided to discuss vacation notification time first. We concluded that a one-week notice prior to a

[7] *International Automated Machines*, 285 NLRB 1122 (1987); *Redwood Empire*, 296 NLRB 368 fn. 1 (1989).

> one week or more vacation should be sufficient in most cases. There are times when it could be at the supervisor's discretion that even less than a week would be fine. In addition, when taking a day or two, two day's notice should be sufficient, again at the supervisor's discretion.
>
> I suggest before the next meeting Renae, you and I meet to develop the wording on this and incorporate the calendar year changes so we can put this to bed.
>
> We agreed to discuss item number 2. next and get additional feedback from employees. The next meeting is scheduled for Thurs 1/21 at 3:30 in the Boardroom.

The recitation of items discussed comports with Hewitt's notes taken at the meeting and, I believe, is reasonably accurate. Hewitt made no promises at the meeting to remedy the employees' expressed concerns, and advised that any policy changes had to be approved by Respondent's corporate officers in St. Louis.

The next meeting scheduled for January 21 was canceled because the Union filed charges with the Board on January 15, 1993, alleging Respondent's conduct vis-a-vis the committee violated the Act. No further meetings had been held or scheduled at the time of the hearing before me. The consolidated complaint now before me alleges, among other things, Respondent violated Section 8(a)(2) and (1) of the Act by announcing and commencing the formation of the handbook committee to deal with Respondent concerning wages, hours, and other terms and conditions of employment; supervising the selection by employees of representatives to the committee; convening and participating in a meeting of its employees in the committee; and rendering assistance and support to said committee by conducting the selection of employee representatives and conducting a meeting on its premises during worktime. It is further alleged that Respondent violated Section 8(a)(1) of the Act by the conduct of Gary Hewitt and Dale Hugelmaier, at the January 14 meeting, of soliciting and impliedly promising to remedy employee grievances in order to discourage union support.

Section 8(a)(2) provides it shall be an unfair labor practice for an employer:

> to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

The first issue here presented is, therefore, whether the handbook committee is or was a labor organization as defined in Section 2(5) of the Act to be:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work.

The Board explained in *Electromation*[8] that:

> Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of ''dealing with'' employers, and (3) these dealings concern ''conditions of work'' or concern other statutory subjects, such as grievances, labor disputes, wages, rate of pay, or hours of employment. Further, if the organization has as a purpose the representation of employees, it meets the statutory definition of ''employee representation committee or plan'' under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects. Any group, including an employee representation committee, may meet the statutory definition of ''labor organization'' even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues.

Here employees participated in committee activity at the behest of the Respondent who caused the departmental selection of employee representatives who were to present the employees point of view during committee meetings. Notwithstanding Hodges' announcement that the committee's task was to identify and correct inconsistencies between handbook statements and current practices, the testimony and Hewitt's January 15 memo establish that employees attendant at the January 14 meeting were permitted to raise their concerns[9] and make proposals on several subjects plainly related to working conditions. Moreover, Hewitt's memo to Hodges reflects he and the others present agreed on what would be an appropriate period for notification of intent to take a vacation, discussed employee evaluations, and agreed to further discuss sick days, makeup time, and personal time, all of which items are reasonably subsumed by the term ''conditions of work,'' and that he recommended to Hodges that the agreement on prevacation notification be reduced to writing and placed in effect.

The Supreme Court has held that, even if proposals and requests similar to those in this case and presented by an employee committee are no more than recommendations, the employer is free to accept or reject in its sole discretion, the presentation and consideration of the proposals and requests are sufficient to establish the committee is ''dealing with'' the employer.[10] The Board has recently commented in *E. I. du Pont*[11] concerning what constitutes ''dealing'' as follows, in significant part:

> [T]he concept of ''dealing'' does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties. That ''bilateral mechanism'' ordinarily entails a pattern

[8] *Electromation, Inc*., 309 NLRB 990, 991 (1992).

[9] Respondent's argument that it cannot be held liable for a violation of the Act because Hawks and other union advocates ''sought to corrupt the stated purpose of the committee to accommodate their own ends,'' i.e., by making the proposals listed by Hewitt which relate to working conditions of employees, is unconvincing. Hewitt need only have refused to consider such suggestions if they were indeed not germane to the purposes of the committee, but he elected otherwise.

[10] *NLRB v. Cabot Carbon Co*., 360 U.S. 202, 214 (1959).

[11] *E. I. du Pont Co.*, 311 NLRB 893 (1993).

> or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.

Because there was only one meeting, it cannot fairly be said a pattern or practice of entertaining employee proposals has been definitively shown but, inasmuch as Respondent had scheduled another meeting and had established no cutoff date for the life of the handbook committee, it is not unreasonable to conclude that but for the filing of the charges on January 15, the meetings would have continued for some indeterminable time. The absence of any showing succeeding meetings would not have continued in the same vein is sufficient, I believe, to support an inference they probably would. Furthermore, the fact the concerns set out in Hewitt's memo to Hodges appear to have little to do with correcting the handbook to accord with established practice, indicates Respondent had willingly permitted the work of the committee to expand to cover those very matters Hodges had stated would not be dealt with, i.e., conditions of work. There is no persuasive evidence the same would not be true of future meetings. The fact that more meetings of the handbook committee would have been held, at least once on January 21 is certain, and the absence of any showing the conduct of future meetings would have differed in terms of subject matter or procedure militates against a conclusion the meetings, either held or to be held, are isolated instances or consist only of the proffer and receipt of ad hoc proposals to be simply accepted or rejected.

Hewitt's memo to Hodges establishes that Hewitt anticipated discussing the items he enumerates therein at future meetings. That he anticipated more than one such meeting is clear from his notation to Hodges that the committee would discuss item number two on his list (sick days, makeup time, and personal time), which obviously relates to working conditions, at the January 21 meeting. However blameless the original intent of Respondent may have been in establishing the handbook committee, Respondent acquiesced to and willingly participated to a change of course and purpose when the January 14 meeting became a forum for the presentation of employee concerns which Hewitt undertook to remedy as his memo plainly shows with respect to the prevacation notification requirement and the scheduling of future discussion of ''concerns which people have regarding our policies.'' The facts in this case require a finding, consistent with the Supreme Court's holding in *Cabot Carbon*, Respondent was ''dealing with'' the Handbook Committee on January 14 concerning working conditions, and would have continued on that course if the unfair labor practices had not been filed on January 15. Accordingly, I conclude and find the handbook committee has, at times material to the allegations before me, had employee members, existed, at least in part, for the purpose of dealing with Respondent concerning employee conditions of work, and has at such times been a labor organization within the meaning of Section 2(5) of the Act.

Respondent totally controlled the formation of the committee, the election of its members, its meeting dates, and the conduct of its meetings. Respondent also paid employee members for time spent at committee meetings. By such conduct, Respondent dominated the formation and administration of the handbook committee, contributed financial support to it, and thereby violated Section 8(a)(2) and (1) of the Act.

I do not agree with General Counsel that Respondent solicited grievances during the January 14 meeting. What really happened in that regard is that Hawks and others unilaterally without coaxing by Respondent raised the subjects described in Hewitt's memo. I do, however, conclude that by entertaining the matters raised by Hawks et al., and reserving them for further consideration in some cases and reaching a consensus in others, e.g., the vacation notification requirements, Respondent impliedly promised to remedy these concerns. Such conduct while a union organizing effort is going on, reasonably tends to interfere with and restrain employees in the exercise of their Section 7 right to seek union representation, and therefore violates Section 8(a)(1) of the Act.

C. *Rules and Related Conduct*

1. The no-access rule

The employees' handbook issued March 1992 provides for discipline up to and including termination for violation of any one of a number or rules, including one barring employees from ''Entering company property without proper authorization at any time other than authorized working hours.''

At midnight on January 8, 1993, off-duty employees Randall Hawks, Tony Jaggers, Dennis Nuyt, and Thomas Parrish stood on the sidewalk and in the company lot, both abutting Respondent's facility, and there spoke to departing second-shift employees on behalf of the Union and gave them union handbills. Dale Hugelmaier,[12] a supervisor and agent of Respondent, directed the four to leave company property because their conduct was contrary to company policy. At one point he also pointed his finger at Parrish, shouted, ''Tom!'' and added, ''Got you, that's all I need!''[13]—when Parrish turned to him in response to his shout.

The four employees named above met with Renae Spencer, Respondent's director of human resources, supervisor, and agent within the meaning of the Act, on January 12, 1993. Tammie Dutton, an executive secretary, was also present and later reduced her notes to a written description of what transpired. Considering the notes of Dutton, the testimony of the other participants, which is complementary rather than contradictory to any appreciable extent, and the probabilities, I find that the men asked if they could be discharged for distributing literature. Spencer replied they were free to so do before and after work and during lunch in nonwork areas. This response is consistent with another handbook rule, whose validity General Counsel does not challenge, and which reads in pertinent part as follows:

> To avoid interference with work and to prevent you from unnecessary annoyance, soliciting, collecting, accepting contribution or distributing written materials is

[12] Hugelmaier did not testify.

[13] Parrish's account, supported by the recollections of Hawks and Jaggers, is credited.

> not permitted during an employee's work time or to another employee while that employee is on working time. Distribution of literature is not permitted for any purpose at any time in working areas of the facility.

Pressed by Nuyt concerning whether this meant handbilling could be done at night when the second shift was coming off, i.e., midnight, Spencer said this was not permitted because it was a safety and security problem. While so stating, she showed Nuyt the handbook rule, first quoted above, concerning the entering of company property at times other than working hours, and confirmed that discharge could be imposed for a violation of this no-access rule.[14] After new lights were installed in the parking lot in early February 1993, by memo dated February 10, 1993, and distributed to all employees by February 18, Respondent revoked the no-access rule and announced the following to be its policies concerning solicitation, distribution of literature, and access to company property, effective February 10:

> To avoid interference with work and to protect you from unnecessary annoyance:
>
> * Soliciting, collecting, accepting contributions or distributing written materials is not permitted during an employee's work time or to another employee while that employee is on working time;
> * Distribution of literature is not permitted for any purpose at any time in working areas of the facility;
> * Non-employees are prohibited from soliciting or distributing material on Company property; and
> * Employees may not enter the interior of the plant or other work areas except the reception area, at any time other than their scheduled work hours.

Conclusions

The applicable test for no-access rules is set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976), which explains that a no-access rule concerning off-duty employees is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity, and that except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. ''Entering company property without proper authorization at any time other than authorized working hours'' is prima facie invalid because it does not meet criteria (1) and denies off-duty employees access to the parking lot and the sidewalk which is obviously an outside nonworking area.

Was the rule nevertheless justified by business reasons? Respondent asserts it was justified for reasons of safety and security. According to Renae Spencer, Hodges advised her in December 1992 that no employees were to be permitted in the parking lot after dark for safety and security reasons because some employees had become concerned because there were several people in the lot after dark the previous night, and the employees were unable to ascertain who they were in the dark. Spencer avers this was the information she relied on when she spoke to the four union supporters on January 12, 1993. She further explains that the reason for the handbook no-access rule was an incident in July or August 1991 when someone broke into the plant one night, gunshots were fired, and the police were called.

Hodges does not speak to the need for the rule which was in place when he came to the Bowling Green facility, but recalls employees being fearful of the presence of unknown persons in the parking lot after dark one night in early December 1992. The unknown persons proved to be the family of a night-shift employee when Hodges approached them. He recalls then observing the poor lighting in the lot and thereafter causing better lighting to be installed. He agrees with Spencer that he told her of the incident in the parking lot, and adds that he also told her he was having the lighting improved.

It is difficult to imagine what deterrent effect a rule barring employees from the premises would have on plant breakins like that in 1991, which has not been shown to be the act of an employee or employees. The reason thus advanced for the promulgation of the rule is speculative and not convincing. See, e.g., *Orange Memorial Hospital*, 285 NLRB 1099, 1100 (1987). Moreover, the rule is ambiguous and may be read as a blanket prohibition barring employees from being anywhere on company property, night or day, if they are neither working nor otherwise specifically authorized by Respondent to be there. This is far too broad a rule on its face and has not been shown to be justified by business reasons. Accordingly, I conclude the rule is invalid and violated Section 8(a)(1) of the Act as did its enforcement against the union handbillers. Compare, e.g., *Presbyterian Medical Center*, 227 NLRB 904, 905 (1977).

Turning to Respondent's argument that when it stopped the handbilling at night it was enforcing a more limited rule which prohibited off-duty employees from entering or remaining on its parking lot after dark, I do not credit Spencer's claim Hodges told her in December 1992 that employees were to be excluded from the parking lot after dark. Hodges did not corroborate this testimony, but merely stated he took steps to remedy the inadequate lighting for safety and security reasons. There is no evidence whatsoever that employees were ever notified of any such policy. All that Spencer did on January 12 when with the four employees is advise them of the written rules. Her advice to them that they could not handbill at night referred to safety and security problems in conjunction with the application of the written no-access rule and cannot be construed as some sort of pronouncement of a second rule hitherto unknown to anyone, apparently even to Hodges. I believe that in this connection Respondent is grasping at straws, imaginative but unconvincing.

With respect to Hugelmaier's remark to Parrish that he had ''got'' him, I note that Hugelmaier testified before Judge Miller that his attitude toward unions was ''Unions are not really in my eyes a good function for a company, because they're for employees that really don't want to work, or don't want to be here at work. They're for troubled employees.'' Inasmuch as Parrish and his handbilling companions were obviously acting on behalf of the Union, I conclude

[14] I credit Jagger, Parrish, and Hawks that Spencer did confirm discharge for violation of the no-access rule was possible. Moreover, merely showing the rule in the handbook to the employees advised them that was the case because the rule is clearly listed as one whose violation could result in termination.

Hugelmaier considered them ''troubled employees'' whose prounion conduct he disapproved of. When a supervisor with such an attitude gleefully advises an employee, in this case Parrish, that the employee has been apprehended in violation of a company rule and this apprehension fit the supervisor's need, the supervisor is plainly communicating he is preparing to take some unspecified action against the employee for that violation. The rule here was bad. It could not be lawfully enforced. Parrish was engaged in protected union activity. The statement by Hugelmaier was a threat to retaliate against Parrish's protected union activity, and reasonably tended to interfere with, restrain, and coerce employees in the exercise of their rights guaranteed in Section 7 of the Act, all in violation of Section 8(a)(1) of the Act.

Returning to January 12, 1993, when Renae Spencer informed employees that the no-access rule hereinabove found unlawful was in effect and violations thereof by handbilling of the second shift at midnight could result in discharge, Respondent by its agent Spencer violated Section 8(a)(1) by threatening employees with discharge by enforcement of an unlawful rule. *Fairfax Hospital*, 310 NLRB 299 (1993).

2. Statements by Ron Parker, Ray Renken, and Ed Whaley

Parker, Renken, and Whaley are all admitted supervisors and agents of Respondent. It is well settled that Respondent is responsible for the conduct of its supervisors.[15] On January 5, 1993, they were instructed by Renae Spencer to read the handbook rule on distribution and solicitation to their employees. This rule is the one previously quoted in this decision which General Counsel does not challenge as unlawful and which is in fact not unlawful.

Leaving the meeting with Spencer, Parker returned to his department and conducted a meeting with employees that same day. Employees Hawks, Douglas, Boards, Frazier testify concerning Parker's statements. A careful study of their testimony persuades me that to the extent Hawks does not agree with the other three, he is not credited. Hawks, an active and outspoken union advocate with a clear interest in the outcome of this proceeding was not as believable as the other three who were consistent each with the other, displayed no pro or antiunion bias, and impressed me as honest working people relating only that which they in fact observed and heard. What happened in the meeting was short and simple. Parker started to read the following excerpt from the employee handbook:

> To avoid interference with work and to prevent you from unnecessary annoyance, soliciting, collecting, accepting contribution or distributing written material is not permitted during an employee's work time or to another employee while that employee is on working time. Distribution of literature is not permitted for any purpose at any time in working areas of the facility. Non employees are prohibited from soliciting or distributing material on company premises.

Hawks interrupted by insisting what Parker was reading was incorrect because it conflicted with information in a union booklet Hawks was holding. Parker advised the handbook was company policy and finished reading the above-quoted material. I find Parker proceeded exactly as Spencer had instructed. He read a lawful rule to the employees and did not, as the complaint alleges, violate the Act by unlawful prohibition of distribution of literature or prohibition of conversation about the Union.

Like Parker, Whaley conducted a meeting of employees on January 5, 1993, at the same hour in the morning. After first making a few remarks about cleaning in the department, he advised those present that he was going to discuss solicitation and distribution. He then started to read the same rule in the handbook that Parker had read to employees in his department. There is some disagreement among the witnesses concerning what then transpired. Bearing in mind that Spencer had instructed the handbook be read to employees, there was no apparent reason for Whaley to depart from those instructions, he clearly tried to so do, Renken finally managed to so do, and Respondent's witnesses on the matter were more believable than Jaggers, Parrish, and Hastings, I conclude Whaley did start to read the rule aloud. He was, however, almost immediately interrupted by Tony Jaggers who, like Hawks at Parker's meeting, asserted that the union handbook in his hand contradicted what Whaley was saying. Fellow union activists Marilyn Hastings and Thomas Parrish joined Jaggers in quoting from the union booklet with respect to solicitation and distribution rights. Ray Renken joined the group while this was going on. When Renken attempted to intervene so that Whaley could finish reading the Handbook rule, his efforts were unsuccessful. He therefore terminated the meeting and directed the employees to return to work. They did so. Whaley did not complete his reading of the rule, and I am convinced that was all he tried to do, I do not credit testimony he made extraneous remarks which would tend to illegally restrict distribution of literature or would contradict the very rule he was trying to read.

Within an hour, the meeting was reconvened by Renken. He apologized for abruptly concluding the earlier meeting, opined that Jaggers may have been correct in his statement concerning employee distribution rights, and read the rule aloud as Whaley had attempted to do earlier that day.

I conclude and find Whaley made no statements on January 5, 1993, considering distributing literature that violated the Act. The complaint allegations to the contrary are dismissed.

On March 9, 1993, Jaggers was called into Renken's office and advised that if he did not sign his evaluation or give a written statement explaining his refusal to sign, he would be written up for insubordination. Jaggers refused to sign or provide an explanatory statement. Renken then handed him an insubordination writeup and said that Jaggers would be further disciplined if he refused to sign that.[16] Jaggers signed the disciplinary writeup. After this transaction, Renken asked why Jaggers was for the Union. Jaggers explained it was due to the Company's policies. There was some further conversation concerning comparisons between Bowling Green benefits and those at a California union plant. Jaggers then left.

[15] *Dorothy Shamrock Coal Co*., 279 NLRB 1298, 1299 (1986).

[16] General Counsel cites *NTA Graphics*, 303 NLRB 801 (1991), for the proposition that an employee's protest of a requirement certain documents be signed, constitutes protected concerted activity. *NTA* does not go quite that far. In that case 16 employees, not just 1, refused to sign handbooks and there was evidence of antiunion animus, all resulting in a violation of Sec. 8(a)(3) of the Act.

Jaggers was an open and ardent union supporter as his conduct in the January 5 meeting illustrates. Respondent knew this was so when Renken asked why it was so. Renken's question is no more invasive or intimidating than the questions posed to Harvey and accompanied by the pronouncement the employer would fight the Union ''to the hilt'' in *Rossmore House*, 269 NLRB 1176 (1984). Accordingly, I find and conclude it did not constitute coercive interrogation violative of Section 8(a)(1) of the Act.

The following morning, January 10, Jaggers informed a number of his fellow employees he had been disciplined for refusing to sign his evaluation, a disciplinary action, he told them he had not heard of ever being done before. Jaggers concedes, however, that he had been earlier told by Renae Spencer he was required to either sign his evaluation or explain in writing why he would not. He further testified that both Hugelmaier and Whaley had told him he did not have to sign his evaluation, but he does not claim anyone told him the alternative condition of giving a written explanation was not necessary.

After Jaggers had discussed his discipline with other employees and commenced working on January 10, Renken came to his work station. According to Jaggers, Renken said he had heard Jaggers had been talking about his January 9 discipline and did not want him to do this because it slowed the work force down, and further stated that if Jaggers continued to talk about it he, Jaggers, would be committing an insubordinate act and this would be cause for discharge.

Renken's version is that when he heard Jaggers had been complaining to other employees about his discipline, which caused them to be upset, he went to Jaggers and told Jaggers that he did not want Jaggers to cause a ''ruckus'' in the plant that could interfere with production. This evoked the reply from Jaggers that he could tell anybody he wanted to about his writeup. To this, says Renken, he rejoined that if Jaggers was going to tell the story he should be accurate and relate it was Jaggers' own fault he was written up and that if he continued to tell the story as he had been doing, Renken would ''straighten the stories out.'' Renken denies threatening Jaggers with discipline if he continued to talk to employees about his January 9 discipline.

Jaggers denies that Renken offered to go with him and talk about the incident if Jaggers continued to talk about it. This does not quite meet Renken's claim he said he would straighten the stories out, but is in the general neighborhood.

Renken is credited where he and Jaggers differ because he was the more believable of the two in general and his testimony had the ring-of-truth in this instance. I therefore find he did not threaten Jaggers with further discipline, but I do find that his efforts to curtail Jaggers' communications to other employees concerning the application of Respondent's policy relative to the signing of evaluations violated Section 8(a)(1) of the Act as reasonably calculated to interfere with, restrain, and coerce Jaggers in the exercise of Section 7 rights because Jaggers was engaged in protected activity when he discussed a working condition, i.e., discipline for refusing to sign an evaluation, with other employees during breaktime. *Pepsi Cola Bottling Co*., 301 NLRB 1008, 1041 (1991). As the Board noted in *Pepsi Cola*, citing *Root Carlin, Inc*., 92 NLRB 1313, 1314 (1951), ''the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.'' There is no evidence Jaggers' activity Renken sought to curtail had slowed production or had a reasonable tendency to create a ''ruckus'' and thus impede production. Renken simply did not want Jaggers to air his views to other employees, whether on breaktime or not, concerning Respondent's policy of requiring evaluations to be signed. Renken was not impeded in any way from presenting Respondent's views to the employees concerning that policy and its applications or from openly contradicting Jaggers' message, but that does not mean Respondent was entitled to stifle Jaggers on the subject when he was on his own time, i.e., breaktime. Renken's efforts to so silence Jaggers were coercive interference with Jaggers' statutory rights.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By forming, dominating, and assisting The Handbook Committee, a labor organization within the meaning of Section 2(5) of the Act, Respondent violated Section 8(a)(2) and (1) of the Act.
4. By maintaining and enforcing a rule prohibiting off-duty employees from distributing union handbills in nonworking areas, Respondent violated Section 8(a)(1) of the Act.
5. By granting its employees a more favorable method of computing overtime in order to discourage union membership and activity, Respondent violated Section 8(a)(3) and (1) of the Act.
6. By promising to remedy employee concerns at a time it knew union organizing was afoot, Respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and therefore violated Section 8(a)(1) of the Act.
7. By threatening to discharge employees if they do not obey its unlawful no-access rule, Respondent violated Section 8(a)(1) of the Act.
8. By threatening an employee with unspecified retaliation because he had not obeyed its unlawful no-access rule, Respondent violated Section 8(a)(1) of the Act.
9. By threatening to interfere with an employee's statutory right to engage in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.
10. The unfair labor practices found above have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease and desist and notice posting requirement, I shall recommend Respondent be required to formally disestablish and cease giving assistance or any other support to the handbook committee. Inasmuch as Respondent has abolished the no-access rule I have found violative of the Act, and has so notified its employees, a formal order that it so do is unnecessary.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The Respondent, Stoody Company, Division of Thermadyne, Inc., Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dominating, assisting, or otherwise supporting the handbook committee created in January 1993 at its Bowling Green, Kentucky facility.

(b) Maintaining or enforcing any rule prohibiting off-duty employees from distributing union literature in nonworking areas where there is no justifiable business reason therefor.

(c) Granting benefits to its employees in order to discourage union membership or activity.

(d) Promising to remedy employee concerns during the course of a union organizing campaign.

(e) Threatening to discharge or otherwise retaliate against employees because they do not obey unlawful company rules.

(f) Threatening to interfere with protected concerted activity.

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately disestablish and cease giving assistance or any other support to the handbook committee.

(b) Post at its Bowling Green, Kentucky facility, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''